

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LARRY GALYARDT
Claimant

VS.

CITY OF WICHITA
Respondent,
Self-Insured

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Docket No. 248,059

ORDER

Respondent appealed the December 1, 2000 Award entered by Administrative Law Judge Nelsonna Potts Barnes.

APPEARANCES

Robert R. Lee of Wichita, Kansas, appeared for claimant. Edward D. Heath, Jr., of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant alleges that he sustained binaural hearing loss while working for respondent because of the noise that he encountered during his 29 years being a firefighter. In the December 1, 2000 Award, Judge Barnes awarded claimant permanent partial disability benefits for an eight percent binaural hearing impairment after finding that claimant's hearing loss began in October 1970 and continued through his retirement on September 30, 1999.

Respondent appealed the Award requesting Board review of the following issues:

1. Did claimant sustain personal injury by accident arising out of and in the course of employment from October 1, 1970, through September 30, 1999?

2. Did respondent receive timely notice of the accident or injuries?
3. Did claimant make timely claim for compensation?
4. What is the nature and extent of claimant's injury and disability?
5. Should any amount be deducted from the award due to preexisting functional impairment?

Although requested, neither claimant nor respondent filed a brief with the Board. Therefore, the Board is without the benefit of the parties' written arguments setting forth their contentions in this appeal.

The issues before the Board on this appeal are those five listed above.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

1. The Award should be modified to increase the weekly compensation rate.
2. The Board affirms the Judge's finding that claimant sustained hearing loss while working for respondent from October 1970 through September 30, 1999. The Board also affirms the finding that the hearing loss arose out of and in the course of employment with respondent. As a firefighter and later fire captain, claimant was on a regular basis exposed to very loud noises, which caused hearing loss.
3. According to Dr. Richard J. Cummings, who is board certified with a specialty in otology, claimant has an approximate 60 percent hearing loss in the left ear and a 40 to 50 percent loss in the right ear. But, using the *AMA Guides*, the doctor calculated claimant's binaural hearing impairment from the noise at work at eight percent. The doctor testified:

Q. (Mr. Lee) You found quite a bit of difference in the left ear than the right ear and that was not compatible completely with noise hearing loss. And you went on to opine that because of that it was your best medical opinion that the hearing [loss] he has in the right ear was from noise loss [sic] at work. An equal amount of that hearing loss would occur in the left ear that would be from noise at work.

And then you testified or opined that a reasonable degree of medical judgment would be that he has an eight percent right ear impairment from industrial noise at work and an eight percent left ear industrial noise at work giving binaural hearing impairment of eight percent, is that correct?

A. (Dr. Cummings) That's correct as stated. Although I should point out that the eight percent is using the AMA method of compilation. His hearing loss in his left ear is at least a 60 percent hearing loss and right ear 40 or 50 percent. But using their method compilation it is much less.¹

4. Based on Dr. Cummings' testimony, the Board also concludes that it is more probably true than not that claimant's hearing loss from loud noise at work continued through his last day of work for respondent on September 30, 1999. The doctor testified:

Q. (Mr. Lee) He [claimant] also has testified that when he is on the scene of a fire he is not able to wear hearing protection because you have to be able to communicate with the other firemen?

A. (Dr. Cummings) I understand that's true.

Q. And he has testified when he appears at the fire they have large fans that blow into the opening of a house or building that is used so that the fireman can see. And that fan is loud enough for you to have to yell in order to communicate with another fireman and turn up your radio very loud to hear that. Is that the type of noise that would cause a hearing loss?

A. He says it's a tremendous amount of noise around the fire, a big fire, and any noise really of over 90 decibels for any extended period of time is going to cause a loss. In fact, 85, when you get to 110 decibels the loss could be rapid.

Q. And when you have to yell so that another person can hear you, is that enough?

A. A yell would be more than 120 decibels.

Q. Doctor, he testified his hearing has gotten worse in the past year and he retired September 30th of 1999, but it had gotten worse a year prior to that. And then even six months prior to September of 1999 he said it has gotten more difficult to hear his radio and he believed it interfered to get a promotion from captain to battalion chief to give directions on his end on the radio. But he said he had not shot a gun or done any target shooting since September of 1998. The last year of increased hearing loss would that be likely as the result of the fire-fighting activities?

A. It's possible.

¹ Deposition of Richard Cummings, M.D., April 12, 2000; pp. 7-8.

Q. Is that more probably true or not true?

. . .

A. I would say more probably true.²

5. The Board affirms the Judge's findings and conclusions that claimant provided respondent with timely notice of the hearing loss and timely written claim for benefits. As early as January 1998 claimant spoke with his battalion chief about having difficulty hearing. At about that time, claimant also provided the chief with some paperwork from a doctor that indicated that claimant had a hearing loss due to his work as a firefighter. Additionally, on September 15, 1999, claimant's attorney mailed a written claim for compensation to respondent and on September 27, 1999, filed an application for hearing with the Division of Workers Compensation. As the injury to claimant's hearing from his work activities continued through September 30, 1999, both notice³ and written claim⁴ were timely.

6. The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.⁵

Dr. Cummings separated out claimant's hearing loss caused by his work environment. The evidence does not establish that claimant had an industrial hearing loss before he began working for respondent in October 1970 and before he began experiencing the repetitive micro-traumas to his ears. As the evidence fails to establish that the doctor's final eight percent rating includes any preexisting impairment, the award should not be reduced.

7. The parties stipulated that claimant's average weekly wage was sufficient to qualify for the maximum weekly compensation rate. Therefore, the weekly compensation rate should be increased to \$383.

² Deposition of Richard Cummings, M.D., April 12, 2000; pp. 10-12.

³ See K.S.A. 44-520 (Furse 1993).

⁴ See K.S.A. 44-520a (Furse 1993).

⁵ K.S.A. 1999 Supp. 44-501(c).

8. The Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the December 1, 2000 Award and increases the weekly compensation rate to \$383.

Larry Galyardt is granted compensation from the City of Wichita for a September 30, 1999 accident and resulting disability. Mr. Galyardt is entitled to receive 8.80 weeks of permanent partial disability benefits at \$383 per week, or \$3,370.40, for an eight percent permanent partial disability, making a total award of \$3,370.40, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of March 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert R. Lee, Wichita, KS
Edward D. Heath, Jr., Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director